Labor & Employment Issues
Client Alert

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For Clients and Friends
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SUPREME COURT HANDS DOWN RULINGS REGARDING VACCINE MANDATES

Just six days after hearing oral arguments, the Supreme Court handed down two much anticipated unsigned decisions regarding judicial stays for two federal vaccine mandates: the Federal Occupational Safety and Health Administration's ("OSHA's") Emergency Temporary Standard ("ETS") for employers with 100 or more employees and the Centers for Medicare & Medicaid Services' ("CMS'") at Health and Human Services ("HHS") Interim Final Rule covering certain healthcare providers ("CMS Rule"). In split decisions, the Court stayed implementation of the OSHA regulation but lifted the stay of the CMS Rule.

As a reminder, the OSHA ETS required employers with 100 or more employees to make certain their employees are fully vaccinated or tested weekly and wearing masks at work. The mandate potentially would have covered 84 million employees. The CMS Rule requires healthcare workers at Medicare & Medicaid facilities to be fully vaccinated absent religious or medical exemptions. That mandate affects more than 17 million workers. Implementation of both mandates had been stayed pending the Supreme Court's decision.

OSHA Vaccine or Testing Mandate

In the 6-3 opinion on the OSHA vaccine and testing mandate, the majority concluded that the ETS exceeded OSHA's statutory authority and granted applicants' application for a stay. A majority of the Court, comprised of Chief Justice John Roberts and Justices Clarence Thomas, Samuel Alito, Neil Gorsuch, Brett Kavanaugh, and Amy Coney Barrett, conceded that OSHA is tasked with ensuring occupational safety as detailed in the Occupational Safety and Health Act, enacted by Congress in 1970. But, while an exception to the usual notice-and-comment procedures for "emergency temporary standards" exists, the majority ruled that an ETS is permissible only in the "narrowest of circumstances: the Secretary must show (1) 'that employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards,' and (2) that the 'emergency standard is necessary to protect employees from such danger.'" The majority noted that the Secretary had used the ETS power only nine times before, but only one rule had been upheld in full. Moreover, while the ETS at issue in this case included exemptions for employees who work either exclusively outdoors or remotely 100% of the time, the majority called these exemptions "largely illusory," explaining that the Secretary had estimated that only 9% of landscapers and groundskeepers would qualify as working exclusively outside. Calling the ETS proposed by OSHA a "blunt instrument" that "draws no distinctions based on industry or risk of exposure to COVID-19," the majority concluded a stay was justified.

Interestingly, the majority allowed that OSHA would have authority to regulate COVID-19 occupational risks, indeed, the mandate would be "plainly permissible" where "the virus poses a special danger because of the particular features of an employee's job or workplace," such as a virus researcher or "in particularly crowded or cramped environments." But, according to the majority, the OSHA ETS covering roughly 84 million workers in so many places, went too far without express Congressional authority.

Conservative Justices Gorsuch, Thomas and Alito concurred and posed the question of who holds the power to respond to the pandemic? To the concurrence, the "answer is clear: Under the law as it stands today, that power rests with the States and Congress, not OSHA."

Liberal Justices Stephen Breyer, Sonia Sotomayor, and Elena Kagan joined in the dissent, which began by stating that the disease has by now "killed almost 1 million Americans and hospitalized almost 4 million." The dissent found that the disease causes harm "in nearly all workplace environments." Ultimately, the dissenters concluded that the majority "seriously misapplie[d] the applicable legal standards." To the dissenters, OSHA's rule "perfectly fits the language of the applicable statutory provisions." Indeed, the agency did just what the Act told it to do: "[i]t protected employees from a grave danger posed by a new virus as and where needed ..." Accusing the majority of substituting "judicial diktat for reasoned policy making," "lacking any knowledge of how to safeguard workplaces" while insulated from accountability for the damage it causes, "this court tells the agency charged with protecting worker safety that it may not do so" even as "disease and death continue to mount ..."

CMS Vaccine Mandate

In the CMS case, two district courts had preliminarily enjoined enforcement of the rule; the Government requested an emergency stay of those injunctions pending appeal from the Supreme Court. In the 5-4 opinion, Chief Justice Roberts and Justice Kavanaugh joined the Court's dwindling liberal bloc, consisting of Justices Breyer, Sotomayor and Kagan, in holding that the CMS mandate "fits nicely within the langue of the statute" under which "Congress has authorized the Secretary to impose conditions on the receipt of Medicaid and Medicare funds that 'the Secretary finds necessary in the interest of the health and safety of individuals who are furnished services.'" The majority went on to note that HHS historically has required participating healthcare facilities to adopt safety precautions ranging from training to the use of surgical gloves to ensure patient safety. Thus, the majority concluded that the Government made a strong showing that it was likely to prevail in defending the regulation and stayed the lower courts' stays. The majority cited statistics that as many as 35% of healthcare workers remain unvaccinated and posed a "serious threat to the health and safety of patients." That danger, the majority found, was exacerbated by the fact that Medicare and Medicaid patients are more at risk because of their age, disability, or poor health. The majority also discussed the overwhelming support of the mandate by public health organizations, which, they said, suggests, under the circumstances, that a vaccine requirement "is a straightforward and predictable example of the 'health and safety' regulations that Congress has authorized the Secretary to implement." Therefore, the majority concluded that the Secretary did not

exceed his statutory authority in mandating that to receive Medicare and Medicaid dollars, covered facilities must ensure their workers are vaccinated.

Justices Thomas and Alito, joined by Justices Gorsuch and Barrett, four of the six conservatives on the nine-seat bench, filed separate lengthy dissents, finding that the Government had not made a sufficient showing of statutory authority to issue the rule. Instead, they said the majority and the Government had relied on a "hodgepodge of scattered provisions" for their main argument that the federal government has the authority to issue such a mandate. Justice Alito chided the Secretary for both acting too quickly without requisite notices and consultations and for the two months' delay in assembling the mandate's exhaustive data, either criticism supporting a continued stay of the mandate issued by the lower courts.

Takeaways

It is conceptually difficult to square Chief Justice Roberts and Justice Kavanagh's justification for joining the far-right block on the OSHA mandate rather than the liberal minority as in the CMS mandate. Indeed, the per curiam admission in the OSHA case that OSHA could have promulgated a more limited and specific rule, coupled with their strong statutory and policy arguments in the CMS case, illustrate just how easy a switch would be. Apparently, the sweeping breadth of the OSHA ETS caused just too much unease for the two conservative justices wary of federal regulatory overreach. This leaves the third Biden Administration mandate - vaccination for government contractors – in legal limbo. Does its breadth push Justices Roberts and Kavanaugh to the far-right, or does the traditional use of government contracts to further policy steer them center-left? Either way, they decide the case.

Whatever the answer to that federal question, a solid 6:3 block consistently approves of state, local and private vaccination mandates. With that in mind, New York State and City mandates, as well as private employer rules, will likely continue to be upheld especially when coupled with religion and medical exemptions. Accordingly, employers, unions and individuals in New York should obey their applicable state and local rules and, even more, stay safe in this very unsafe time.

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